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No. 84-1377.

IN THE
Supreme Court of the United States

October Term, 1984

CABLE NEWS NETWORK, INC.

Petitioner,

v.

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK AND
THE JUDGES OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF

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1. The Brief in Opposition attacks an argument that Petitioner does not make. Respondents' entire brief depends on the unstated premise that CNN claims an absolute "First Amendment right to televise judicial proceedings." Brief in Opposition ("Br. Opp.") at 1. Respondents further attribute to CNN the view that *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), makes the telecasting of trials "a constitutional requirement." (Br. Opp. 3). Petitioner argues nothing of the kind.

2. By suggesting that granting certiorari in this case would amount to a declaration that such recent precedents as *Chandler* v. *Florida*, 449 U.S. 560 (1981), addressed only "frivolous" questions (Br. Opp. 3), Respondents both underestimate this Court and overestimate the precedential value Petitioner would attribute to *Richmond Newspapers*. The due process issues disposed of in *Chandler* would remain serious even if Petitioner were to prevail here. And the argument that *Richmond Newspapers* itself *already* "established a right to telecast" trials (Br. Opp. 3) is one Petitioner does not advance. The court below held that the First Amendment right to observe trials is not even *implicated* when observation is sought by means other than physical attendance. Petitioner contends only that, by so holding, the Second Circuit both *anachronized* the access right established by *Richmond Newspapers* and its progeny, by forcing that right into the procrustean bed of nineteenth century technology, and *trivialized* that right by limiting it to the right of a handful of citizens to squeeze into the back of a crowded courtroom. It is Petitioner's position *not* that *Richmond Newspapers* settled a general right to television access, but that the existence of such a right in particular cases cannot, despite the Second Circuit's contrary view, be categorically denied; that the existence of a qualified right of audio-visual access poses questions of sufficient moment to require this Court's plenary attention; and that this case is the ideal vehicle for such consideration.

3. The Opposition Brief, by its conspicuous silence on the matter, tacitly concedes that the flat and unlimited administrative ban on audio-visual access endorsed by the judgment below conflicts with this Court's prior holding that "a mandatory [exclusion] rule, requiring no particularized determination in individual cases, is unconstitutional," even where the rule leaves most of the affected trial open to public observers. *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 611 n.27 (1982). *See* Petition for Certiorari ("Pet.") at 25. Just as this Court has uniformly required a case-by-case determination

to accommodate the public's right to observe trials with the integrity and solemnity of the judicial process,[1] so regulation of particular means of providing the public with access — whether by physical attendance, through artists' sketches, or through discreet videotaping — requires the same careful tailoring in each case.[2]

4. Respondents' musings on the perils audio-visual coverage poses to judicial fairness and decorum are supported by little beyond the quotation of dicta penned decades ago when the medium was new and its technology clumsy. But even *Chandler*, the recent case that Respondents deem "peculiarly relevant" (Br. Opp. 3), recognized that there is no *necessary* antagonism between broadcast coverage and the judicial search for truth. 449 U.S. 575-79. Specifically, the *Chandler* Court rejected the notion that broadcast coverage and the resultant publicity are automatically in tension with judicial decorum and integrity and thus with fairness. *Id.* at 574-575. For *Chandler* expressly repudiated a *per se* rule that "broadcast coverage . . . is a denial of due process," *id.* at 574, and held instead that "the appropriate safeguard against such prejudice" is the litigants' right to show that "their trial was affected adversely

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[1] *See, e.g., Press-Enterprise Co.* v. *Superior Court*, 104 S.Ct. 819, 824, 826 (1984); *Chandler* v. *Florida*, *supra*, 449 U.S. at 574-575; *Richmond Newspapers*, *supra*, 448 U.S. at 580-581. *See also* Pet. at 25-26 n.36.

[2] Respect for First Amendment concerns has been held to require district courts to make particularized findings of harm to the judicial process before prohibiting attendance only by the general public — while admitting the press — during sensitive testimony, *Douglas* v. *Wainwright*, 739 F.2d 531 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 1170 (1985); before categorically barring post-verdict interviews of jurors, *In re Express News Corp.*, 695 F.2d 807 (5th Cir. 1982); before banning verbatim notetaking, *United States* v. *Cabra*, 622 F.2d 182 (5th Cir. 1980); and before banning sketching either in or out of the courtroom, *United States* v. *Columbia Broadcasting System*, 497 F.2d 102 (5th Cir. 1974). Contrary to Respondents' mistaken assertion (Br. Opp. 3), CNN indeed contends in its petition that the judgment below is in conflict with these decisions of other courts of appeals. *See* Pet. at 25-26 n.36.

by the impact on any of the participants of the presence of cameras and the prospect of broadcast." *Id.* at 575, 581.

5. In this regard, the Brief in Opposition simply ignores the careful findings of the trial judge below — findings not questioned by the Court of Appeals — that Petitioner's proposed coverage would in fact *enhance*, rather than disrupt or prejudice, the course of justice in the instant case. (Pet. 6, 16, 23). That the district judge reached this conclusion despite a self-confessed initial distaste for television as a low-brow, vaudeville medium (Pet. 6) belies the crude effort of the Brief in Opposition to depict this district judge as eager to "'plum[e himself] for a satisfactory television performance'" (Br. Opp. 5). Under the guidelines approved by the district court and assumed to be adequate even by the Second Circuit (Pet. 8), the district judge would hold plenary power to control all aspects of the coverage precisely to avert subversion of the judicial process before it could occur.

6. Were it not for Respondents' extraordinary suggestion to the contrary (Pet. Opp. 4), it would go without saying that constitutional questions are not to be resolved by plebiscites. The *general* scope and meaning of the First Amendment right of trial access should be determined not by polls of judges or attorneys, but by this Court as steward of the Constitution. Similarly, the propriety of audio-visual taping or live coverage of a *particular* trial should be determined by the judge presiding over that trial, subject to appropriate appellate review — not by a referendum of his or her judicial peers. The Opposition Brief offers no reason why the historic duties of this Court in expounding the Constitution, and the traditional prerogatives of district judges in controlling their own courtrooms, should give way in this case to mere opinion surveys of the sort Respondents cite.

7. In their haste to set up a *constitutional* straw man which Petitioner does not in fact put forth, Respondents utterly fail

to challenge the second, purely *statutory* ground for granting certiorari — that the judgment below improperly allows a *per se* rule not promulgated or even contemplated by Congress to override the evolving common law substantive right of physical and electronic access to trial records and testimony expressly recognized in *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589 (1978). *See* Pet. 26-29. The Second Circuit has thus endorsed a flagrant violation of the Rules Enabling Act, the very legislation pursuant to which the flat ban in General Rule 7 was promulgated. 28 U.S.C. § 2072. This alone is sufficient to warrant plenary review by this Court.

8. Respondents' attempt to depict the issues presented here as insubstantial and previously decided flies in the face of this Court's explicit recognition in *Chandler* that this "area [is] charged with constitutional nuances," 449 U.S. at 572-73. As both courts below conceded, and as Respondents do not deny, the *Westmoreland* trial presents the "paradigm case" for considering the scope of the First Amendment right to observe trials. That other trials might be less well suited to the presence of television for current viewing or for historic preservation — a point Respondents make with some fanfare (Br. Opp.4) — would be relevant only if Petitioner were urging an absolute

or automatic right to televise *all* trials, something CNN has never advocated. For the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

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